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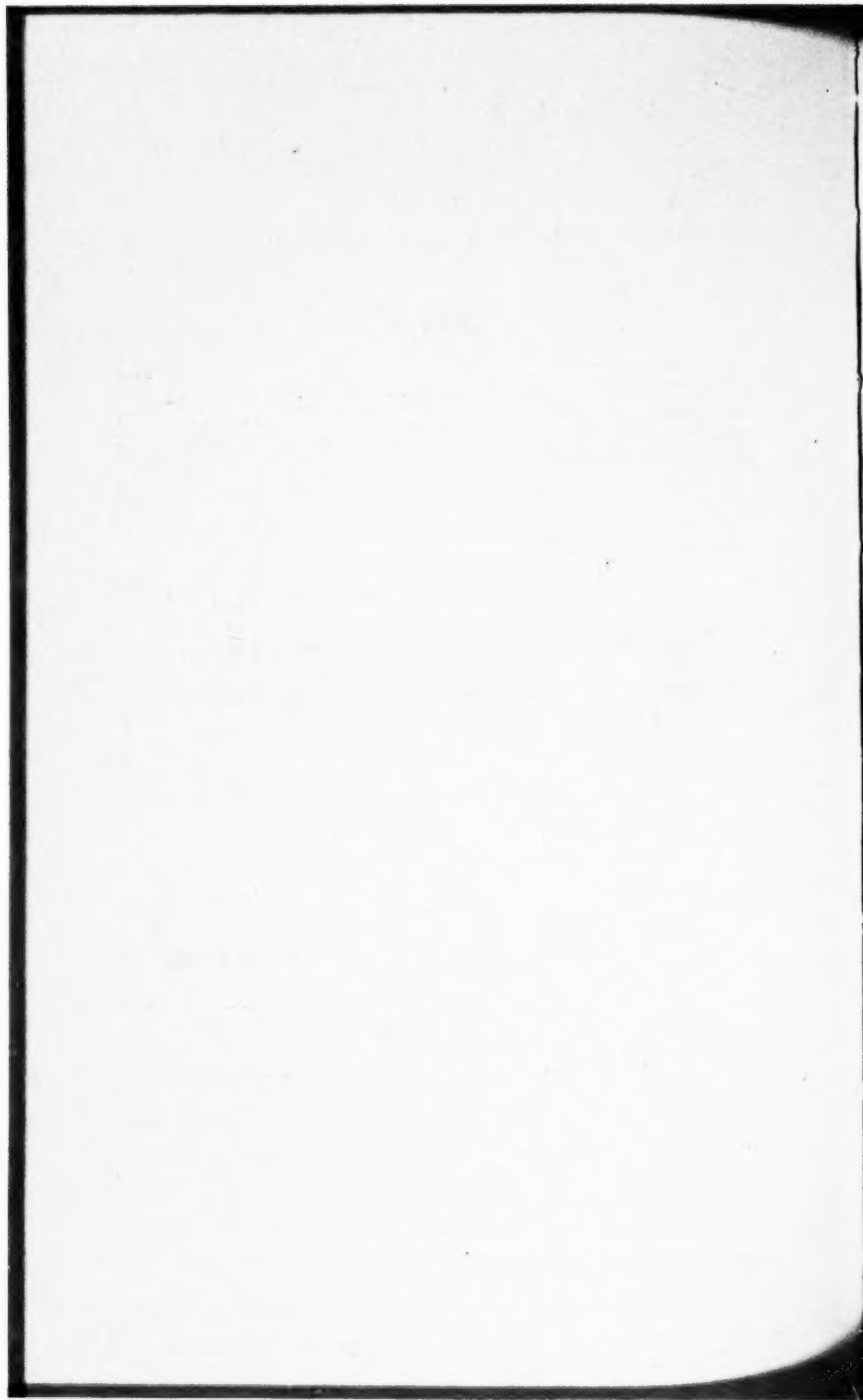
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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 678

FRED P. WEISSMAN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION**

OPINION BELOW

The opinion of the court below (R. 84-89) is reported in 170 F. 2d 952. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 34-37) are reported in 71 N. L. R. B. 147.

JURISDICTION

The decree of the court below was entered on November 29, 1948 (R. 83). The Company's petition for rehearing was denied on January 3, 1949 (R. 93). The jurisdiction of this Court was invoked under Section 1254 of 28 U. S. C. 1254, as codified June 25, 1948, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board properly determined that the Company violated Sections 8 (1), (3) and (4) of the Act, where, following a series of exclusions of union members from the plant by anti-union employees assisted by supervisors, the Company permitted an employee, who testified before the Board in proceedings to investigate such exclusions, to be evicted from the plant by the anti-union employees and denied her reinstatement upon her demand.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 9-10.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, the Board on September 30, 1946, issued its findings of fact, conclusions of law, and order (R. 34-37). The pertinent facts as found by the Board, may be summarized as follows:

This case is a sequel to a companion case, also now before this Court on a similar petition, and entitled *Fred P. Weissman v. National Labor Relations Board*, Case No. 677, this Term. Both cases were argued and submitted together to the

court below, and decided in one opinion (R. 84-89).

As shown in the Board's brief in No. 677 (pp. 4-6), between September 19 and October 29, 1945, the petitioner's predecessor, Fred P. Weissman, d/b/a Fred P. Weissman Company, through its officials and supervisors, participated and acquiesced in the discriminatory exclusion from its plant of five employees, members of the International Ladies' Garment Workers Union, A. F. of L., herein called the Union, by an anti-Union group of employees. Employee Sims witnessed the exclusion of these employees on September 19 (R. 18; 45-46).

On February 20, 1946, at the hearing of the above companion case before the trial examiner, Sims testified with respect to the aforementioned exclusion incident as a witness for the Board (R. 19; 50-51). That hearing was concluded on March 6 (R. 19; 44), and on the next day, as Sims left the plant, she was confronted by an anti-Union group of employees, comprising substantially the same girls who had participated in the prior exclusions (R. 19; 51-52), and was told that "her services were no longer needed and that * * * [she] needn't come back in the morning * * * because [she] couldn't get in" (R. 19-20; 51). Sims did not report for work the next morning, Friday, March 8 (R. 20; 52), but on the afternoon of March 11, and thereafter, she made repeated efforts, thwarted to a large

extent by petitioner's procrastination, to contact petitioner's officers and managers to advise them how she had been excluded from the plant, and that she had not quit work and desired reinstatement (R. 20-22; 52-54, 56-59, 63-64, 66-70, 82). Petitioner was advised both over the telephone and by letter of the circumstances of Sim's exclusion (R. 21-22; 56-59, 82), but petitioner took the position that it would not reinstate her without an order from the Board (R. 22-23; 73-74).

Upon these facts, the Board determined that petitioner was responsible for Sims' exclusion from the plant (R. 24-26, 34). The Board found that the petitioner's failure to repudiate the earlier exclusions and its refusal to reinstate the excluded employees, encouraged the anti-Union employees in their determination to exclude Union adherents from the plant and in ultimately evicting Sims from the plant (R. 24-25, 34-35). It found further that the incidents in the earlier case showed that petitioner manifested an attitude of hostility to the Union, of which the anti-Union employees were aware (R. 25). It pointed out that petitioner was under an affirmative duty to control the tenure of its employees and not to delegate its power of discharge to any union or anti-Union group of employees, a duty which it violated by relinquishing control of Sims' admission to the plant to an anti-Union group of employees (R. 25, 34-35). The Board accordingly found that petitioner violated Section 8 (1),

(3) and (4) of the Act by permitting the eviction of Sims because of her adherence to the Union, and because she had testified at the Board hearing in the earlier case (R. 25-26, 34-35). It ordered the petitioner to cease and desist from its unfair labor practices, to instruct its employees it will not permit such exclusions from its plant, to reinstate Sims with back pay and to post appropriate notices (R. 35-37).

On August 28, 1947, the Board filed a petition for enforcement of its order in the court below (R. 1-5), and on November 29, 1948, the court handed down its opinion sustaining the Board's order in full, and entered its decree of enforcement (R. 83-89).

ARGUMENT

The instant case presents only a question of whether the evidence was sufficient to establish that petitioner was responsible for the loss to Sims of her job at petitioner's plant which followed her union activities and testimony before the Board. It thus presents no issue justifying review by this Court.

Petitioner contends that (1) inasmuch as none of its officials participated in, or even had knowledge of the exclusion of Sims until after it occurred, it bears no responsibility therefor, and (2) the preservation of harmonious labor relations at the plant relieved it of any obligation to refrain from discriminating against Sims, as provided in Section 8 (3) of the Act, and justified

both its condonation of Sim's exclusion from the plant, and its refusal to reinstate her.

1. The exclusion of Sims in the instant case, as the Board found (R. 24-25, 34-35), was a continuation of the pattern of discrimination practiced by petitioner and its predecessor, resulting from their own hostility to the Union and from their failure and refusal to take any remedial or precautionary measures to prevent the recurrence of any exclusions following those perpetrated during September and October by the anti-Union group of employees. Clearly, the exclusion of Sims followed as a result of petitioner's failure to fulfill its duty under the Act to afford reasonable protection to its Union-member employees against disorderly conduct and ouster from their jobs at the hands of the anti-Union employee group. Having failed to sustain its statutory obligation in this respect, petitioner is liable for the consequences regardless of whether or not its representatives were directly involved in Sims' exclusion from the plant. In addition, as the Board further found (R. 23-24), petitioner refused to grant Sims' request for reinstatement after being apprised of her exclusion. Consequently, petitioner can not seriously contend even a lack of knowledge as a defense with respect to this phase of its alleged discrimination. *National Labor Relations Board v. Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C. A. 6); *Clover Fork Coal Co. v. National Labor Relations Board*, 97 F. 2d

331 (C. A. 6); *National Labor Relations Board v. General Motors Corp.*, 116 F. 2d 306, 309-310, 311 (C. A. 7); *Matter of Detroit Gasket & Manufacturing Company*, 78 N. L. R. B., No. 83.

Upon these considerations the Board was warranted in finding, as it did (R. 24-25), "that respondent's [petitioner's] failure to repudiate the acts of these [anti-union] employees in excluding the union employees, following the original exclusions, on September 19, and its refusal to reinstate them thereafter upon demand, encouraged the anti-union employees in persisting in their determination to exclude union adherents from the plant, and in ultimately evicting Sims from the plant, just as they had excluded the others on September 20 and October 29."

2. Petitioner also takes the position that since Sims' difficulties arose out of an argument between her and a large number of anti-Union employees concerning the Union, it might have been better for her to go than to have made a great number of other employees dissatisfied (R. 79-80). As the above argument and cited cases demonstrate, the requirements of the Act preclude petitioner from taking the position that the preservation of harmonious labor relations among its employees justified its refusal to reinstate Sims. Thus, the Board properly found that petitioner discriminated against Sims in violation of Section 8 (3) of the Act (R. 25), and assumed responsibility for the consequences. Since, as

the Board found, the discrimination against Sims was caused in part because she had given testimony under the Act, it follows that the discrimination also constituted a violation of Section 8 (4) of the Act (R. 26).

The contention that the decision of the court below imposes a harsh and unworkable rule is without merit. Petitioner seeks a rule permitting it to substitute its judgment based upon its own interests in derogation of those requirements of the Act which protect the rights of employees. There is, accordingly, no valid reason why petitioner should be relieved of the obligations flowing from its failure to act as required by law.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no issues warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(2) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting
commerce. * * *

* * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) are as follows:

* * * *

SEC. 10. * * *

* * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * *